IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1660 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANUBHAI BHAGWANJI JOSHI

Versus

HARSADRAI CHUNILAL VYAS

Appearance:

MR SURESH M SHAH for Petitioner

MR PM THAKKAR for Respondent No. 1, 6, 7

MR PR THAKKAR for Respondent No. 5

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 04/08/2000

C.A.V. JUDGEMENT

1. The tenant-revisionist having failed in the trial court as well in the lower appellate court has preferred this revision under section 29(2) of the Bombay Rent Act

(for short "Act").

2. The brief facts giving rise to this revision are as under:

3. The disputed premises is owned by the plaintiff trust. It had let it out to the defendant-revisionist on monthly rent of Rs.35/-. Rent amounting to Rs.1,540/for a period of 44 months from 15.6.1978 was in arrears, and the defendant failed to pay the same inspite of notice of demand given on 4th July, 1978 which was duly served on him. Accordingly, the suit for eviction was filed on the ground of non-payment of rent exceeding six months within a period of one month of service of notice of demand. The other ground was for raising permanent structure and making additional construction without written consent of the landlord.

4. The suit was contested by the defendant-revisionist denying the allegation regarding arrears of rent and also the allegation regarding raising permanent structure. He also raised dispute regarding standard rent. Service of notice of demand was not disputed.

5. The trial court framed 13 issues, and most of the issues were redundant. On relevant issues the trial court found that the defendant-revisionist was in arrears of rent for more than six months, and that he was not ready and willing to pay the rent. The notice was found to be valid. The trial court did not find that the defendant raised permanent structure without written consent of the landlord. Likewise, it also negatived the plea of the landlord that the defendant has caused damage to the suit accommodation. Regarding standard rent, the trial court found that the standard rent should be Rs.35/-per month and the contractual rate of rent was not excessive. The trial court further found that the landlord failed to establish that the suit accommodation was reasonably and bonafide required by him for the purpose of demolishing the same and erecting new building. On the finding that the tenant did not pay rent exceeding six months after receipt of notice of demand the suit for eviction and recovery of arrears of rent was decreed.

6. The tenant preferred appeal. The appellate Court considered only one point, namely, whether the case fell within the ambit of Section 12(3)(a) of the Act and whether the defendant was not ready and willing to pay the rent. It also considered the dispute of standard

rent. The appellate court found that the standard rent of Rs.35/-per month fixed by the Small Causes Court was just and reasonable. The appellate court concurred with the findings of the trial court that the case was covered under section 12(3)(a) of the Bombay Rent Act and that the tenant-revisionist was not ready and willing to pay the rent nor he did comply with the requisite conditions of Section 12(3)(b) of the Bombay Rent Act for saving his dispossession. On these findings the appeal was dismissed. It is, therefore, this revision by the tenant.

7. It is true that this is a case of concurrent findings recorded by the two courts below, hence, interference under section 29(2) of the Bombay Rent Act in this revision is very much limited. However, this limitation can not be stretched to the extent that in no case the concurrent findings recorded by the two courts below can be interfered in such a revision. If it is found that the courts below committed patent error in interpreting the provisions of the Rent Act and committed error of law, certainly, revisional interference would be justified.

8. The only point for consideration in this revision is whether the case of the landlord fell within the ambit of section 12(3)(a) of the Act or under section 12(3)(b) of the Act. On this point, I have heard Shri M.S.Shah, Learned Counsel for the revisionist and Shri P.C.Kavina, Learned Counsel for the landlord-respondent. Shri P.C.Kavina has tried to make a distinction between Sections 12(3)(a) and 12(3)(b) of the Act. He argued that these two sections give protection to the tenant and not that the landlord has to choose between the two sections for eviction of the tenant. As against this, Shri Shah relied upon several pronouncements of this court and contended that if the case does not fall within the ambit of Section 12(3)(a) neither the landlord nor the court can switch over to section 12(3)(b) for passing decree for eviction against the tenant. Shri Shah relied upon three judgments delivered by me in the cases of Narbheram Ambalal & Co and others vs Jayantilal Dahyabhai Kharva reported in 1998(2) GLH 550, Amratlal Pand Patil vs Vasantlal Motilal reported in 1998(2) GLH 571 and Kasambhai Ismailbai vs Bavabhai Karsanbhai Patel reported in 1998(2) GLH 606. In these cases relying on the Apex Court verdict in N.M.Engineer vs Narendrasingh reported in AIR 1995 SC 448 view was taken by me that the decree for recovery of possession under section 12(3)(a) can be passed when the following conditions are fulfilled:

(i) The rent should be payable monthly, (ii) There should be no dispute regarding the amount of standard rent or permitted increase, (iii) Such rent or increase should be in arrears for a period of six months or more, and (iv) the tenant neglects to make payment of such arrears until expiration of period of one month from service of such notice.

9. If the above conditions on the plaint allegations are not made out then the landlord can not switch over to Section 12(3)(b) of the Act. Section 12(3)(b) provides that in any other case no decree for eviction shall be passed in any such suit if on the first day of hearing of the suit or on or before such other day as the court may fix, the tenant pays or tenders in court the standard rent and permitted increase then due and continues thereafter to pay or tender in court such rent till the suit is finally decided and pays costs of the suit as directed by the court.

10. The words "in any other case" used in Section 12(3)(b) of the Act have to be interpreted with reference to Section 12(3)(a). The word "in any other case" used in section 12(3)(b) mean a case which is not covered by section 12(3)(a). No other interpretation to these words "in any other case" is possible. This view was taken by me in the case of Narbham Ambalal & Ors vs Jayantilal Dahyabhai Kharva reported in 1998(2) GLH 550 placing reliance upon the Apex Court verdict in the case of N.M.Engineer vs Narendra Virdi reported in AIR 1995 SC 448. In para 9 the Apex Court had occasion to consider this aspect of the matter and observed as under:

> "In other cases Section 12(3)(b) is applicable. The cases covered thereunder are for arrears of rent of less than six months."

Thus, on the basis of the Apex Court verdict referred above and earlier decisions rendered by me, it is very difficult to take a contrary view that if section 12(3)(a) does not apply, then decree for eviction can be passed under section 12(3)(b).

11. It is now to be seen wheter the case is covered under section 12(3)(a) of the Act or not. As discussed earlier, interalia, Section 12(3)(a) will not apply where there is dispute of standard rent. If there is no dispute of standard rent and the tenant failed to pay arrears of rent exceeding six months within a month of

service of notice of demand, certainly decree for eviction can be passed, but, if there is dispute regarding standard rent the case can not be covered under section 12(3)(a) of the Act, and in that event if the standard rent is fixed and the tenant has come-forward to deposit the standard rent, he can not be said to be a defaulter or a tenant who neglects to pay the arrears of rent or remains unwilling to pay the arrears of rent. It is only after dispute of standard rent is resolved that the next question for consideration arises whether the tenant has made statutory compliance of Section 12(3)(b) of the Act to save his eviction. If the ingredients of section 12(3)(a) are made out by the landlord, the courts have no option but to pass decree for eviction of the tenant. If the case is not covered under section 12(3)(a) of the Act decree for eviction can not be passed. If the dispute of standard rent is raised and is resolved either before the institution of suit or during the pendency of the suit, and the defendant failed to make the deposit after such resolution of dispute about standard rent and further failed to make deposit regularly in the trial court as well as in the appellate court, then certainly he looses protection under section 12(3)(b) of the Act and he can be evicted.

12. It may also be mentioned that the dispute of standard rent should be bonafide and not malafide.

13. Shri Kavina, however, raised two contentions. The first was that the dispute of standard rent was raised by the tenant before the institution of the suit and it shall be deemed to have been abandoned. The question of abandonment of dispute of standard rent or waiver of such dispute by the tenant, to my mind does not arise in the instant case. Waiver of such dispute is to be adjudged with reference to the intention of the tenant. If the tenant simply raises dispute of standard rent before the institution of the suit but subsequently does not press such dispute it can certainly be said that he has waived the dispute regarding standard rent. However, in the facts and circumstances of the case, as well as from the evidence on record, it can not be said that the revisionist-tenant has waived the dispute regarding standard rent. The dispute regarding standard rent was raised by the tenant as back as the year 1971. As against this, the notice of demand Exh.71 was served on 4.7.78. If the tenant, during this period of about 7 years, did not move an application for fixation of standard rent it can not be said that he had waived the dispute regarding standard rent. If the trial court has

fixed the standard rent at the rate of Rs.35/-p.m. and the arrears of rent as alleged by the landlord were for a period of 44 months, it follows that even after 1971 the landlord was accepting the rent from the tenant at the rate of Rs.35/-p.m. The fact that the tenant was paying rent to the landlord after 1971 at the rate of Rs.35/-p.m. also can not tentamount to waiver of dispute of standard rent. The notice of demand was admittedly served on the defendant. He gave reply to the notice on 15.7.1978 vide Exh.73. In this reply notice, which was given well within a month of service of notice of demand, the dispute of standard rent was raised by the tenant. Thus, the tenant raised the dispute of standard rent within a month of service of notice of demand. It therefore negatives the contention that the tenant waived the dispute of standard rent. It may also be mentioned that the dispute of standard rent was raised by the tenant in the written statement and it was also raised in the trial court as well as before the lower appellate court. It can hardly be said that the tenant had ever waived or abandoned the dispute of standard rent.

14. Another contention of Shri Kavina has been that the dispute of standard rent was malafide and unless it is bonafide the dispute of standard rent can not take the case out of the purview of Section 12(3)(a) of the Act. In my view, there is no cogent material on record for holding that the dispute of standard rent was malafide. Simply because the trial court fixed the standard at Rs.35/-p.m., which according to the landlord was contractual rate of rent, it can not be said that the dispute of standard rent was malafide. The tenant was justified in pleading that the standard rent should be less than the contractual rate of rent, but if the findings of the two courts below are that the contractual rate of rent was not more than the standard rent, it can not be said that the dispute of standard rent was malafide. I, therefore, do not find any force in the contention that the dispute of standard rent was malafide.

15. Shri Kavina further contended that because for the first time application by the tenant for fixation of interim standard rent was moved after six months,i.e., on 6.12.1978 vide Exh.10, this delay itself is sufficient ground for holding malafide on the part of the tenant. Exh.10, however, was not an application for fixation of standard rent. It was an application for fixation of interim standard rent. Interim standard rent is not to be equated with standard rent, hence, malafide on the part of the tenant can not be attributed and accepted.

16. Shri Kavina further argued that the learned counsel for the tenant made an endorsement on 18.1.1980 before framing issues that the application for fixation of interim standard rent be decided along with the suit and he has no objection to said procedure. However, this consent or endorsement of the tenant's counsel can not be said to be a ground for holding that the dispute of standard rent was malafide or it was waived.

17. Shri Kavina next contended that the dispute of standard rent can be raised only in one way by moving application under section 11(3) as required by Explanation I to Section 12 of the Act. For this he placed reliance upon the case of Jaypal Bandu Adke and another vs Basavali Gurulingappa and another reported in AIR 1982 Bom.563. As against this, Shri Shah placed reliance upon the decision of the Full Bench of this Court in the case of Ramniklal Dwarkadas Modi vs Mohanlal Laxmichand & Ors reported in 18 GLR 32. This court is bound by the decision of the Full Bench of this court. The Bombay High Court also considered the Full Bench pronouncement of this court in 18 GLR 32 and the Division Bench of the Bombay High Court dissented from the Full Bench decision of this court. However, this court can not dissent from the decision of the Full Bench of this court, rather it is bound by the Full Bench verdict of this court. In Ramniklal case (supra) the Full Bench of this court has laid down as under:

"(a) If the tenant files an application to the court under section 11(3) of the Bombay Rent Control Act within a period of one month of the receipt of the notice referred to in section 12(2) of the Act, he shall be deemed to be ready and willing to pay the rent and permitted increases specified in the order made by the court as per provisions of section 12 read with the Explanation.

(b) The tenant can also establish his readiness and willingness to pay the rent due by any other mode than the one indicated in the Explanation read with section 12 of the Act, as for example, by tendering the demanded amount of rent in cash within one month of the receipt of the notice referred to in section 12(2) of the Act. This illustration regarding payment in cash is merely illustrative and not exhaustive."

(c) The tenant can also claim protection from the operation of section 12(3)(a) of the Act by raising a dispute as to the standard rent either prior to the notice under section 12(2) of the Act or by reply to the notice, but in this case the tenant must do so within one month from the receipt of the notice referred to in section 12(2) of the Act.

These two requirements are made out in the instant case before me, inasmuch as the dispute of standard rent was raised by the tenant before the institution of the suit as well as before the receipt of notice, and he further raised the said dispute within one month of the receipt of statutory notice of demand.

18. The Full Bench further held that it is not a further requirement for such protection that the tenant must make an application under section 11(3) of the Act.

19. In view of the above pronouncement of the Full Bench of this court it is clear that the dispute of standard rent can be raised in many ways, one of such ways is that it can be raised before the receipt of notice of demand. Secondly, such dispute can be raised within one month of receipt of notice of demand. Thirdly, such dispute can be raised by making application under section 11(3) of the Act for fixation of standard rent. But, in any case, it is not required that the tenant in order to claim protection must make application under section 11(3) of the Act. If either of these modes are followed by the tenant, it can be said that he raised the dispute of standard rent, and if such dispute was subsisting, provisions of section 12(3)(a) could not be attracted and the decree passed by the two court on these facts and circumstances can not be sustained.

20. Shri Kavina relied upon the Apex Court verdict in the case of Harbanslal Jagmohandas and another vs Prabhudas Shivlal reported in AIR 1976 sC 2005 in support of his contention that the only mode for raising such dispute is to make an application under section 11(3) of the Bombay Rent Act. However, this contention does not find support from the Apex Court verdict cited by him. On the other hand, the Apex Court's view is that the dispute of standard rent must be raised at the latest before expiry of one month from the date of service of notice under section 12(2) of the Act and it is not enough to raise a dispute for the first time in the

written statement. The discussion regarding provisions of section 11(3) and section 11(4) of the Act by the Apex Court relates to the procedure to be followed while deciding the application under section 11(3) and the orders to be passed thereon. The observation of the Apex Court in this case that it is only when an application disputing rent is made within the time contemplated by Explanation I to section 12 of the Act that the provisions in subsection (3) and (4) of section 11 are attracted does not mean that the only mode of raising the dispute of standard rent is by making application under section 11(3) of the Act.

21. Shri Kavina further argued that because the application for fixation of interim standard rent was not pressed and there was endorsement by the tenant's counsel that it may be disposed of along with the suit, it can be inferred that the dispute of standard rent was not bonafide. The Apex Court in the case of Mistry Premjibhai Vithaldas vs Ganeshbhai Keshavrji reported in 18 GLR 790 in para 10 of its judgment observed that "where a tenant does not prosecute an application for fixation of standard and deliberately permits it to be dismissed for non-prosecution it could be reasonably inferred that it was not a bonafide application at all." This observation of the Apex Court does not apply to the facts and circumstances of the case before me for the simple reason that the tenant did not get his application for fixation of interim standard rent dismissed for non-prosecution rather he made request through his advocate to postpone its decision along with the suit. The request for postponement of decision on the said application along with the suit does not tantamount to dismissal of said application for non-prosecution. Hence, I am unable to agree with Shri Kavina that the application for fixation of interim standard rent was malafide. The case of Ganpat Ladha vs Sashikant Vishnu Shinde reported in 19 GLR 502 relied upon by Shri Kavina also hardly helps him in supporting the decree for eviction passed by the two courts below. What the Apex Court has laid down in this case is that when the conditions under section 12(3)(a) of the Bombay Rent Act are satisfied, it is obligatory for the court to pass a decree for eviction. If there is statutory default or neglect on the part of the tenant, whatever may be its cause, the landlord acquires a right under section 12(3)(a) to get a decree for eviction. But, where the conditions of section 12(3)(a) are not satisfied there is a further opportunity given to the tenant to protect himself against eviction. He can comply with the

conditions set out in section 12(3)(b) and defeat the landlord's claim for eviction. If, however, he does not fulfill those conditions, he can not claim protection of section 12(3)(b) and in that event there being no other protection available to him, a decree for eviction would have to go against him. However, in the case before me, since the ingredients of section 12(3)(a) are not satisfied there was no occasion for the courts below to consider whether the tenant has complied with the statutory requirements of section 12(3)(b) or not.

22. In view of the above discussions, it can be concluded that the dispute of standard rent was there and it was validly raised by the tenant in a bonafide manner, hence, the case did not fall within the ambit of section 12(3)(a) of the Act. The dispute of standard rent was resolved only at the time of disposal of the suit. If the application for interim standard rent was not disposed of, it has no consequence because the tenant was required to deposit the standard rent and not the interim standard rent fixed by the court in order to save his dispossession. Since after resolving the dispute of standard rent in the final judgment no time was given by the trial court to the tenant to make good the deficiency in deposit it can not be said that the tenant was not ready and willing to pay the rent.The Division Bench pronouncement of this court in the case of Nanji Pancha vs Daulal Naraindas reported in 1970 GLR 285 can be referred. The Division Bench of this Court in this case observed that the court even suo motu could have extended the date to enable the tenant to make necessary compliance after fixing the standard rent. As such the tenant had no opportunity to make statutory compliance of section 12(3)(b) of the Act.

23. For the reasons given above, revision has to be allowed, and is hereby allowed. The judgments and decrees of the two courts below, insofar as eviction of the revisionist is concerned, are set aside and the decree for arrears of rent etc passed by the two courts below are hereby maintained. Under the circumstances, there shall be no order as to costs.

4.8.2000 (D.C.SRIVASTAVA,J)